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Supreme Court of the United States

October Term, 1949

No. 20

**OSCAR F. TREICHLER, Executor
of the Estate of Fred A. Miller,**

Appellant,

vs.

STATE OF WISCONSIN.

Appeal from the Supreme Court of the State of Wisconsin

Brief of Appellee

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No. 20

OSCAR F. TREICHLER, Executor
of the Estate of Fred A. Miller,

Appellant,

vs.

STATE OF WISCONSIN.

Appeal from the Supreme Court of the State of Wisconsin

Brief of Appellee

The appeal is by the executor of the will of Fred A. Miller, deceased, from a judgment of the Supreme Court of the State of Wisconsin determining the amount of Wisconsin inheritance taxes payable in the estate of said decedent. (R. 9-15, Fol. 26-34)

NATURE OF THE CASE

The decedent died testate, a resident of the State of Wisconsin, leaving a total estate of \$7,849,714.84 of which \$6,869,778.61, or 87.52%, had a tax situs in the State of

Wisconsin and \$979,936.23, or 12.48%,^{*} was located outside the State of Wisconsin in the States of Illinois and Florida and subjected to succession taxes by those states.

In the computation of the Wisconsin inheritance taxes there was allowance of deductions that included federal death taxes, which reduced the net estate subjected to Wisconsin inheritance taxes down to \$3,803,378.42. Such deductions were apportioned on the basis of the ratio of the property within Wisconsin to the total estate and the amount allowed in Wisconsin was \$3,066,400.19. This included \$2,690,999.56 of the total federal death taxes of \$3,076,131.18.

The total Wisconsin inheritance taxes computed in accordance with the decision of the Supreme Court of Wisconsin here under review, amount to \$745,399.11. The Illinois inheritance taxes amounted to \$35,616.26 and the Florida estate taxes were \$21,709.45.

Sections 72.01 to 72.24 of the Wisconsin Statutes impose what is commonly called a "normal" inheritance tax computed separately on the value of the interest of each beneficiary at graduated and progressive rates. Sections 72.50 to 72.61 of the Wisconsin Statutes impose what is sometimes called the "estate" tax, which is in the amount equal to the excess of the 80% federal basic tax credit over all death taxes paid to all states. Both said "normal" inheritance tax and said "estate" tax are imposed for and the proceeds used for general state revenue purposes. Then, section 72.74 of the Wisconsin Statutes imposes an "additional emergency" inheritance tax for relief purposes, rehabilitation of World War II veterans, construction and improvement of state institutions and other state property, and post-war public works projects to relieve post-war

unemployment. This "emergency" tax was initially imposed for two years only but has been successively extended biennially by the legislature. It is expressly imposed upon the transfers of property which are taxable under the "normal" inheritance tax and the "estate" tax and is rated at 30% of the amount of said taxes and in addition thereto.

The contention of the appellant is that, because the "estate" tax is computed in reference to the 80% federal basic death tax credit, the imposition of the "additional emergency tax" at 30% of the total "normal" inheritance taxes and the "estate" tax makes it a tax on the property that was outside the State of Wisconsin and it therefore is invalid as extra-territorial taxation.

STATUTES INVOLVED

The provisions of sections 72.01 to 72.24 Wisconsin Statutes 1943 imposing the "normal" inheritance taxes, so far as here material, are as follows:

"72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws or voluntary associations organized solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) WHILE A RESIDENT OF STATE. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) NONRESIDENT'S PROPERTY WITHIN THE STATE. When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death.

"(3) TRANSFERS IN CONTEMPLATION OF DEATH. . . .

"(4) TRANSFER BEFORE OR AFTER PASSAGE OF ACT. . . .

"(5) TRANSFER UNDER POWER OF APPOINTMENT. . . .

"(6) JOINT INTERESTS. . . .

"(7) INSURANCE PART OF ESTATE. . . .

"(8) BASIS OF TAX. The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. Inheritance and estate taxes imposed by the government of the United States shall be deemed debts and shall be deducted in determining the value of the property transferred.

"(9) RECIPROCITY AS TO NONRESIDENT DECEDENTS. Personal property of a nonresident decedent made taxable under this chapter, except tangible personal property having an actual situs in this state, shall not be subject to the tax so imposed if a like exemption was allowed at the time of death of such decedent by the laws of the state, territory or district of the decedent's residence in favor of residents of this state."

"72.02 Primary rates, where not in excess of twenty-five thousand dollars. When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

"(1) TWO PER CENTUM, WHERE. [Close relationships set forth.]

"(3) SIX PER CENTUM, WHERE. [More remote relationships set forth.]

"(4) EIGHT PER CENTUM, WHERE. [Distant relationships set forth.]"

"72.03 Other rates, where in excess of twenty-five thousand dollars. The foregoing rates in section 72.02 are for convenience termed the primary rates. When the amount of the clear value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

"(1) [Twice primary rates on \$25,000 to \$50,000.]

"(2) [Three times primary rates on \$50,000 to \$100,000.]

"(3) [Four times primary rates on \$100,000 to \$500,000.]

"(4) [Five times primary rates over \$500,000.]"

"72.035 Rate limit. The tax imposed by section 72.02 and section 72.03 shall not exceed 15 per cent of the property transferred to any beneficiary."

"72.04 Exemptions. The following exemptions from the tax, to be taken out of the first twenty-five thousand dollars, are hereby allowed:

"(1) [Transfers to municipal corporations and for religious, charitable, educational, etc. purposes]

"(2) [\$15,000 to widow, \$5,000 to husband, and \$2,000 to each beneficiary within close relationship in the 2% bracket]

"(4) [\$250 to each beneficiary within more remote relationship in 6% bracket]

"(5) [\$100 to each beneficiary within distant relationship in 8% bracket]

"(6) [Exemption of resident's tangible personal property located out of the state]

"(7) [Requests for burial lot, etc.]

"(8) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or nonresident decedent, upon the transfer of any property, when the property or estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages or other securities representing property or estate partly within and partly without the state, any beneficiary of such estate shall be entitled to deduct only a proportion of his share of the debts, expenses of administration, and of his Wisconsin exemption, equal to the proportion which his interest in the property within the state or within its jurisdiction bears to his entire interest in such estate.

"72.12 County Courts. (1) Jurisdiction. The county court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a county court in other

matters or proceedings coming within its jurisdiction; and if two or more county courts shall be entitled to exercise any such jurisdiction, the county court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other country court.

"(2) . . .

"(3) . . ."

"72.15 Hearing and determination of tax. (1)

. . .

" . . .

"(10) ORDER OF COUNTY COURT DETERMINING VALUE OF ESTATES AND LIABILITY TO TAX. Upon the determination by the county court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be in the form prescribed by the department of taxation. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, and the department of taxation, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed.

" . . ."

"72.23 Taxes; payment; application. All taxes levied and collected under sections 72.01 to 72.24, inclusive, less any expenses of collection, the percentage to be retained by the county, and the deduction authorized under sections 72.01 to 72.24, inclusive, shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature may by law direct."

The provisions of sections 72.50 to 72.61, Wisconsin Statutes 1943 imposing the state estate tax, so far as here material, are as follows:

"72.50 Tax imposed. In addition to the taxes imposed by sections 72.01 to 72.26, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19."

72.61 Provisions applicable. The provisions of chapter 72, relating to the tax on inheritances and transfers, shall apply to the taxes imposed by sections 72.50 to 72.61 in so far as the same are applicable and not in conflict with the provisions hereof."

The provisions of section 72.74 Wisconsin Statutes 1943 imposing the 30% additional emergency inheritance tax, so far as here material, are as follows:

"(2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes, an emergency tax for relief purposes, rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1945 which said tax shall be equal to 30 per cent of the tax imposed by said sections.

"(3) The emergency tax upon transfers of property imposed in subsection (2) shall be administered, assessed, collected and paid in the same manner, at the same time, and subject to the same regulations that are applicable, respectively, as provided for the administration, assessment, collection and payment of the taxes imposed in chapter 72 of the statutes; provided, however, that the entire amount of said emergency tax shall be collected and paid into the general fund.

"(4) * * * [Separability clause]

"(5) * * * [Procedure for recovery of erroneous tax]"

STATEMENT OF THE CASE

Fred A. Miller died testate on December 19, 1943, a resident of Milwaukee County, State of Wisconsin. His will was duly admitted to probate in the County Court for Milwaukee County, State of Wisconsin. He left a total estate of \$7,849,714.84, of which 87.52% or \$6,869,778.61 had a tax situs in the State of Wisconsin and only 12.48% or \$979,936.23 was located in and subject to taxation in the states of Illinois and Florida. Because of its size the death taxes imposed by the United States amounted to \$3,076,131.18, which includes both the basic and additional federal estate taxes.

After allowances of deductions, including the federal estate taxes, there was a net estate of \$3,803,378.42 subject to Wisconsin inheritance taxes. The allowance of deductions was on a pro rata basis as provided in section 72.04 (8) Wisconsin Statutes 1943. Such deductions totalling \$3,066,400.19 included \$2,690,999.56 as 87.48% of the total federal estate taxes of \$3,076,131.18. [The difference between this 87.48% and the 87.52% arises out of adjustments which are not in dispute and have no materiality here.]

At the time of the decedent's death sections 72.01 to 72.24, Wisconsin Statutes of 1943 imposing the Wisconsin "normal" inheritance tax, sections 72.50 to 72.61 Wisconsin Statutes of 1943 imposing the Wisconsin "estate" tax, and section 72.74 Wisconsin Statutes of 1943 imposing an "additional 30% emergency" inheritance tax, were all in effect and applicable.

On the net estate of \$3,803,378.42 subject to Wisconsin inheritance taxation the total "normal" inheritance taxes

computed in accordance with and under sections 72.01 to 72.24 Wisconsin Statutes 1943, amounts to \$220,682.12.

The 80% of the basic federal estate tax, which is allowable under the Internal Revenue Act of 1926 as a credit on the federal basic estate tax, amounts to \$630,709.62. Inheritance taxes of \$35,616.26 were paid to the State of Illinois, and estate taxes of \$21,709.45 were paid to the State of Florida. The total of said Wisconsin "normal" inheritances, the Illinois inheritance taxes and the Florida estate taxes is \$278,007.83. The 80% allowable federal estate tax credit thus exceeds said total state taxes by \$352,701.79. Under the provisions of sections 72.50 to 72.61 Wisconsin Statutes 1943 the estate is therefore subject to the Wisconsin "estate" tax imposed by said sections and the amount of such tax is \$352,701.79.

Under the provisions of section 72.74 Wisconsin Statutes 1943 the estate is also subject to a Wisconsin "emergency" inheritance tax equal to 30% of said Wisconsin "normal" inheritance tax and said Wisconsin "estate" tax. Such "emergency" tax so calculated amounts to \$172,015.20. The total of such Wisconsin taxes is thus \$745,399.11. The computation of said taxes is as follows:

TABLE "A"

(1) Wisconsin Normal Inheritance Taxes	\$220,682.12
(2) Wisconsin Estate Tax:—	
80% of U. S. Estate Tax	\$630,709.62
Less:—	
(a) Wis. Normal Taxes	
(1) above	\$220,682.12
(b) Ill. Inheritance Taxes	35,616.26
(c) Fla. Inheritance Taxes	21,709.45
Total State Taxes	278,007.83
Difference is Wis. Estate Tax	352,701.79
(3) Wisconsin Emergency Tax:—	
Wis. Normal Taxes	
(1) above	220,682.12
Wis. Estate Tax	
(2) above	352,701.79
Total	573,383.91
Emergency Tax is 30%	172,015.20
Total Wisconsin Inheritance Taxes	\$745,399.11

Such computation is in accordance with the interpretation and application given to the Wisconsin Statutes by the Supreme Court of Wisconsin and its remand directs the County Court for Milwaukee County to so determine the Wisconsin inheritance taxes payable in the estate. It is from the judgment of the Supreme Court of Wisconsin to this effect that the appellant executor brings this appeal.

SUMMARY OF ARGUMENT

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRATERRITORIALLY.

A. Appellant does not carry his burden of showing extraterritorial impact of the taxes involved. He fails to show by clear and cogent evidence that such is the actual result here. Examples of what might be the situation in other extreme and hypothetical cases do not constitute evidence of extraterritorial taxation in this case.

B. Factually there is no extraterritorial taxation here. Of the entire property of decedent $87\frac{1}{2}\%$ was within Wisconsin. The net estate subjected to taxation in Wisconsin amounts to only $48\frac{1}{2}\%$ of the entire gross estate of decedent. Allowance of deduction for federal death taxes more than compensates for or offsets any effect resulting from computation of Wisconsin "estate" tax in relation to the 80% federal basic estate tax credit. Furthermore, the total of the Wisconsin "estate" tax of \$352,701.79 and the 30% "emergency" tax of \$105,810.54 computed on such "estate" tax, is \$458,512.33 which is only 72.6% of the federal 80% basic estate tax credit of \$630,709.62.

C. Fact that the total Wisconsin inheritance taxes exceed the federal 80% basic estate tax credit does not establish extraterritorial effect.

D. If the entire estate of the decedent were in Wisconsin the total Wisconsin inheritance taxes would be higher.

E. Measurement of the tax by factors outside the state does not itself render the tax extraterritorial. It is well established that rating of a tax by facts in respect to matters outside the state does not render it extraterritorial.

F. The pattern of the Wisconsin inheritance tax statutes, which includes the "normal" tax provisions, the "estate" tax statute, and the 30% "emergency" tax, is clearly to impose taxes only on the property within its taxing jurisdiction.

II. THE 30% ADDITIONAL EMERGENCY TAX IS NOT DIRECTLY GEARED TO THE FEDERAL ESTATE TAX.

It is laid at a percentage of the amount of the "normal" taxes and the amount of the Wisconsin "estate" tax, both of which are independent taxes that are clearly valid and laid as a burden solely on the transfer of property which is within the taxing jurisdiction of the State of Wisconsin.

ARGUMENT

I. THE WISCONSIN INHERITANCE TAXES DO NOT OPERATE TO IMPOSE ANY TAX EXTRATERRITORIALLY.

As computed the taxes involved do not fall upon any property except that portion of the decedent's property which was within the State of Wisconsin at his death and subject to its taxing jurisdiction. The appellant does not even contend that the taxes involved fall upon or are asserted against any property outside the State of Wisconsin. No claim is made that the property outside of the state is in any way liable for the Wisconsin inheritance taxes or that such taxes are a lien upon or collectible out of such property. All that appellant does is say that the

Wisconsin taxes operate to tax property outside of the state because such taxes bear a relationship to the federal estate taxes.

A. Appellant Does Not Carry His Burden of Showing Extraterritorial Impact of the Taxes Here.

Appellant shows that the total of the Wisconsin inheritance taxes in this case exceeds the amount of the federal estate tax credit of 80% of the federal basic estate tax and that in the absence of this 30% additional emergency tax the total of the Wisconsin inheritance taxes would not exceed such federal credit. Appellant says that because it is the imposition of the 30% additional emergency tax which makes the total Wisconsin taxes exceed the federal credit, therefore such 30% additional emergency operates here to tax property which is outside of the State of Wisconsin. But, that is not enough to carry the burden which the appellant assumes when he attacks the validity of this tax.

Examples are presented as to what appellant says would be the situation in other extreme estates when the facts are entirely different. These present no basis for saying that the taxes here operate to tax extraterritorially. Even though it might be that in some extreme set of circumstances, if such a case ever did arise (there having been none to date) the results would be as appellant sets out and go beyond the bounds of valid taxation, such examples assume that the Wisconsin tax laws would be applied there as appellant contends. They give no effect to the full realization by the State of Wisconsin that it cannot tax extraterritorially. Such examples, however, do not affect the case here. Those cases will be faced as and when

they arise, if they ever do, and it must be presumed that the Wisconsin tax statutes will be applied thereto in a constitutional manner.

Such extreme examples do not show unconstitutionality of these tax laws as applied in this case. Even if the results would follow in those instances and constitute extraterritorial taxation if applied in that fashion to such extreme cases, that would not make the taxes here invalid as in violation of equal protection. For then if such tax laws could not be so applied there because to do so would produce an invalid result, it would be because of the peculiar facts in such cases which are entirely different from the instant case. Appellant is the champion of no rights except his own.

The Hypothetical Table set out at page 16 of Appellant's Brief does not take proper account of the taxes paid to other states. The federal 80% basic estate tax credit is apportioned on the basis of the ratio of the Wisconsin property to the total estate and then the taxes paid to other states is deducted from the Wisconsin apportioned amount. This produces a figure that neither means or shows anything for it is a purely selected arbitrary result. If the appellant's theory is that Wisconsin should impose its estate tax on the basis of its apportionment of the federal 80% basic estate credit then there should be eliminated the deduction not only of the Florida and Illinois taxes but also the Wisconsin "normal" taxes which are deducted and do reflect an apportionment of the tax burden here.

The validity of the Wisconsin "estate" tax and the correct amount of it in the sum of \$352,701.79 are not questioned and are not in issue in this case. But in this Hypothetical Table the amount of the Wisconsin "estate" tax

is shown to be \$274,590.00, which figure is clearly erroneous and has nothing to do with this case.

The first table on page 13 of Appellant's Brief gives no consideration to the 30% "emergency" tax on the Wisconsin "normal" taxes nor to taxes paid other states. The second table on that same page gives no consideration to credit either for Wisconsin "normal" taxes or for taxes paid to other states.

In none of appellant's tables is it made clear that the 30% "emergency" tax is applicable separately to the Wisconsin "normal" taxes and the Wisconsin "estate" tax. There is no question but that this 30% "emergency" tax applies separately to each of said taxes. This is not in controversy in the case, but from the tables it would appear that the 30% "emergency" tax is always measured solely by the Wisconsin "estate" tax.

The brief of amicus curiae pursues the same method of showing extreme examples, yet the case which such counsel have as the basis for such brief here, is one where there is no property outside of the state of Wisconsin.

The situation here is comparable to where one attacks a state income tax apportionment formula used in the allocation of the income from the transaction of a multi-state business. In those cases the test is whether the state statute is fairly calculated to assign to that state that portion of the net income reasonably attributable to business done there. If so, the statute is valid and no constitutional question exists. The burden is on the one who attacks the statute as taxing extraterritorially. He must carry that burden by showing by "clear and cogent evidence" that the statute actually results in extraterritorial values being taxed. *Butler Bros. v. McColgan*, (1942) 315 U. S. 501, 62 S. Ct. 701.

86 L. ed. 991; *Edison California Stores, Inc. v. McColgan*, (1947) 30 Calif. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16.

There is no clear and cogent evidence in this case that the 30% additional emergency tax of section 72.74 results in extraterritorial taxation. Rather the facts show to the contrary.

Furthermore, consideration of the Wisconsin inheritance tax statutes, as is shown later herein in Subdivision I F., discloses that their design and application is such as to impose taxes only on the property which is within the taxing jurisdiction of the State of Wisconsin. Thus, like in the case of apportionment formulae, the design and purpose of the Wisconsin inheritance tax laws is to tax only property which it may properly and validly tax because it is within its taxing jurisdiction. Anyone who asserts that such inheritance tax laws have an operative effect of taxing property outside its taxing jurisdiction must likewise be held to proof thereof by clear and convincing evidence.

B. Factually There Is No Extraterritorial Taxation In This Case.

The 30% additional emergency tax is not laid extraterritorially by the provisions of section 72.74 nor is it applied in this case so as to tax any property other than that portion of the decedent's estate which is within the State of Wisconsin. The language of subsection (2) is that this 30% additional tax "is hereby imposed upon all transfers of property which are taxable under the provisions of" sections 72.01 to 72.74 and sections 72.50 to 72.61. This language makes it clear that this 30% additional tax is definite-

ly limited to the same property, the Wisconsin property, that is taxed by the "normal" Wisconsin inheritance tax and the Wisconsin "estate" tax.

The net Wisconsin estate of the decedent here subjected to the Wisconsin taxes is \$3,803,378.42, which is only 48½% of the entire gross estate of \$7,849,714.84. Such Wisconsin net estate is arrived at by taking the total of the property located in Wisconsin, which is \$6,869,778.61, and subtracting therefrom the allowable deductions of debts, expenses of last illness and burial, costs of administration and federal death taxes. As provided by section 72.04 (8) Wisconsin Statutes, these were all deducted on a pro rata basis of 87.48%. [The very slight difference between this and 87.52% arises out of adjustments in valuations not here material] Thus, the total of all federal death taxes (not just the federal basic estate tax) of \$3,076,131.19 was allowed and included in such deductions at \$2,690,999.56 as 87.48% of the total tax. This reduced the Wisconsin net estate by the full proportionate share of the total federal taxes referable thereto.

Such deduction allowances, and especially the allowance of a deduction for federal estate taxes, are purely matters of legislative grace. The State of Wisconsin is not required to make any such allowance but does so as a matter of reducing its taxation to an imposition on the net value actually transmitted to the beneficiaries. The effect of these deductions is to reduce the net estate subjected to taxation in Wisconsin to \$3,803,378.42 or only 48½% of the entire property of \$7,849,714.84 left by the decedent, of which total property only \$979,936.23 or 12½% was outside the State of Wisconsin.

If instead of deducting the \$3,066,400.19, which is 87½% of the allowable items, from the Wisconsin gross estate of

\$6,869,778.61, the allowable items were subtracted at 100%, or \$3,505,258.50, from the total gross estate everywhere of \$7,849,714.84, the result would be \$4,344,456.34 as the total net estate everywhere. Applying to this last figure the 87½ percentage for the Wisconsin property produces \$3,803,378.42 which is the amount of the net estate in Wisconsin that is subjected to its taxes. This shows that, in the design of the Wisconsin inheritance taxes and their application to this estate, the objective is to confine their imposition to property within the state and they have been so applied here.

This result is found as a fact by the Supreme Court of Wisconsin where it notes that more than 86% of the property was admittedly located in Wisconsin. The accurate percentage is 87.52%. The federal estate tax credit which enters into the Wisconsin estate tax imposed by secs. 72.50 to 72.61 is however only 80% of the federal basic estate tax. The other 20% more than absorbs, or is, on any mathematical basis, attributable to the 12.47% of the gross estate which is outside of Wisconsin.

It is also significant as respects the Wisconsin "estate" tax that in its calculation there is deducted out the total death taxes paid the States of Illinois and Florida. This shows that such tax is levied only in respect of property situated in the State of Wisconsin.

Moreover, in the calculation of said Wisconsin "estate" tax the Wisconsin "normal" inheritance taxes are also deducted. The result is that the Wisconsin "estate" tax is equal to only 55.92% of the federal 80% basic estate tax credit and that percentage of the federal 80% basic estate tax credit is the amount by which the 30% "emergency" tax in controversy is measured.

The deductions made in arriving at the net Wisconsin taxable estate, and especially the inclusion therein of an allowance for the entire federal death taxes, furnishes and operates as a compensating factor which more than offsets or overcomes, so far as the property upon which the tax actually falls is concerned, any influence that could possibly be deemed to result from the use of the federal estate tax 80% credit in computing the Wisconsin "estate" tax and the rating of the "additional emergency tax" at 30% thereof.

In the calculation of the net Wisconsin taxable estate there is a deduction taken of \$2,690,999.56 for federal death taxes, which deduction is a matter of pure legislative grace and operates to reduce the property valuation subjected to Wisconsin taxes by exactly that amount. On the other hand the entire 80% federal estate tax credit is only \$630,709.62. Were no deduction allowed for the federal death taxes paid the result would be that the Wisconsin "normal" inheritance taxes payable by the beneficiaries would be very much higher, as a result of the progressive rates in the higher brackets. If such deduction of \$2,690,999.56 were not allowed the Wisconsin net taxable estate would be that much larger. Such increase in the net estate would fall into the top bracket of 10% which would raise the Wisconsin "normal" taxes approximately \$270,000. That amount far exceeds the "emergency" tax of \$172,015.20. Furthermore, there can be no question that then the application of the 30% "emergency" tax to such augmented "normal" taxes of some \$490,000 or approximately \$147,000 would be valid.

Comparison of the mathematical relationship of the amount of the Wisconsin "estate" taxes and the amount of the "emergency" taxes with the amount of the federal 80%

basic estate tax credit shows quite a different picture from that attempted by appellant. The amount of the Wisconsin "estate" tax is \$352,701.79. The 30% "emergency" tax computed thereon amounts to \$105,810.54. The total of these two amounts is \$458,810.54 which is only 72.7% of the federal 80% basic tax credit of \$630,709.62, whereas the property in Wisconsin is 87½% of the entire property of the decedent. Even if instead of just the 30% emergency tax computed on the Wisconsin "estate" tax, the entire 30% emergency tax of \$172,015.20 is used, then the total of the Wisconsin "estate" tax and the "emergency" tax is \$524,716.99, which again is only 83.2% of the federal 80% basic tax credit as compared with the 87½% ratio of Wisconsin property to property everywhere.

A similar comparison with the total of the federal basic estate tax is equally significant. The entire federal basic tax is \$788,387.02. The \$458,810.54 total of the Wisconsin "estate" tax and the 30% "emergency" tax computed only on such Wisconsin "estate" tax, is 66.3% of the entire federal basic estate tax. The \$524,716.99 total of the Wisconsin "estate" tax and the entire 30% "emergency" tax, is 76.1% of the entire federal basic estate tax.

These comparisons show that the total of the Wisconsin "estate" and "emergency" taxes is at a far lesser percentage of the federal 80% basic estate tax credit, and of the federal basic estate tax itself, than the percentage thereof that are attributable to Wisconsin property.

C. That the Wisconsin Inheritance Taxes Exceed the Federal Estate Tax Credit Does Not Establish That They Are Extraterritorial in Effect.

The mere fact that the total of the Wisconsin inheritance taxes exceeds the federal estate tax credit cannot render such Wisconsin inheritance taxes invalid as extraterritorial in effect. If that were true then there would be invalidity in the Wisconsin inheritance taxes in almost all Wisconsin estates. The amount of the "normal" Wisconsin inheritance taxes under sections 72.01 to 72.24 exceeds any federal credit allowable in all but the very large estates of over about \$2,000,000 and in the rare case where special circumstances may result in the Wisconsin "normal" tax being less than the federal credit. Clearly the mere mathematical fact of the Wisconsin "normal" taxes being in excess of the federal estate tax credit does not render such "normal" taxes invalid as taxing extraterritorial values. This demonstrates that the mathematical result that the total Wisconsin inheritance taxes exceed the federal tax credit does not establish or show extraterritorial taxation.

Furthermore, it is clear that the Wisconsin "estate" tax of sections 72.50 to 72.61 would be payable and in the same amount, which is also true of the "normal" inheritance taxes of sections 72.01 to 72.24, regardless of the existence of this 30% emergency tax. The validity of such other taxes is not questioned as operating to tax extraterritorially. It thus logically follows that the admeasuring of the additional emergency tax at a percentage of the amount of such other admittedly valid taxes does not and cannot of itself operate as extraterritorial taxation.

In addition, in instances where the amount of the "normal" Wisconsin inheritance taxes under sections 72.01 to

72.24 exceeds the federal tax credit, which is in practically all Wisconsin estates, not only is it true that the fact the normal taxes do exceed the federal credit does not make the "normal" tax invalid or extraterritorial taxation to the extent of such excess, but the 30% additional emergency tax is applied to such total Wisconsin "normal" inheritance taxes. In such cases the amount of the emergency tax likewise is in excess of the federal tax credit. But, clearly that is of no moment and it does not cast any doubt upon the validity of the emergency tax in those cases. The 30% emergency tax in those cases not only itself is beyond the federal tax credit but it is computed at a percentage of a previously computed tax which exceeds the federal tax credit. In this same connection it may be noted that in many Wisconsin estates the total of the Wisconsin "normal" inheritance taxes under sections 72.01 to 72.24 not only exceeds the federal tax credit but exceeds the total of all federal death taxes. Yet, the 30% emergency tax is equally applicable and valid in such cases.

The foregoing shows that the mere fact that the total of the Wisconsin inheritance taxes is in excess of the amount of the federal estate tax credit will not support appellant's assertion of extraterritorial taxation. Therefore if there is to be any support for this charge it must be found in a consideration of the facts from a mathematical point of view. But the facts rather than sustaining it clearly show to the contrary.

D. Were the Entire Estate of the Decedent in Wisconsin the Total Wisconsin Inheritance Taxes Would be Larger.

It is maintained that factually the taxes here do not fall and are not imposed upon property outside of Wisconsin; that the fact that the taxes exceed the 80% federal estate tax credit does not make them extraterritorial in operation; and that the admeasuring of a state tax by factors outside the state likewise does not render the tax extraterritorial where as here the tax is laid on a net valuation which is far less than the total valuation of the property of the decedent in the state. But, in addition, the conclusive demonstration of the restriction of this tax to solely that part of the decedent's property which was within the taxing jurisdiction of Wisconsin by being located in that state, is a calculation of the Wisconsin taxes that would have been payable had the entire estate of the decedent been in Wisconsin. If the entire \$7,849,714.84 had been Wisconsin property then the Wisconsin Inheritance Taxes would have been very much higher than in the instant case. Following is the calculation if such were the case:

Total Wisconsin Estate	\$7,849,714.84	
Less—deductions (100%)	3,505,258.58	
	<hr/>	
Net Wisconsin taxable estate	\$4,344,456.26	
	<hr/>	
Normal Taxes (approximate)		\$285,609.00
Wisconsin Estate Tax—		
Federal 80% credit	680,709.00	
Less—Wis. Normal Tax	285,609.00	
	<hr/>	
		345,100.00
Emergency taxes—		
Normal Taxes	\$285,609.00	
30% thereof	85,682.70	
Wis. Estate Tax	345,100.00	
30% thereof	103,530.00	
	<hr/>	
		189,212.70
	<hr/>	
Total Wisconsin Taxes		\$819,921.70

This shows that the total Wisconsin Inheritance Taxes payable in this estate are not higher as asserted by the appellant because part of the property was outside the state, but on the contrary that such taxes are lower because of the fact that a part of the property was outside the state.

E. Measurement of the Tax by Factors Outside the State Does Not of Itself Render a Tax Extraterritorial.

Even though it were to be considered that, because the 30% "additional emergency tax" is computed in part upon the amount of the Wisconsin "estate" tax which in turn is calculated in relation to the 80% federal estate credit, there is a using of the property outside of Wisconsin in measuring the amount of such 30% additional tax, still that standing alone does not make this 30% tax have an extraterritorial effect and invalid. It is well established that a state tax may be measured by property, events or action which have a location outside of the state and that such rating of the tax by such outside factors does not make the tax invalid as extraterritorial. *Marwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 L. ed. 1124; *Great Atlantic & Pacific Tea Co. v. Grosjean*, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193; *State of Wisconsin v. J. C. Penney Co.*, (1940) 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267.

In *Marwell v. Bugbee*, *supra*, the Court said at page 539:

"* * * When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 232. * * *

The instant case is in no way comparable to *Frick v. Pennsylvania*, (1925) 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058, relied upon by the appellant. The Pennsylvania statute there involved expressly laid the taxes on the transfer

of property by a resident decedent whether it was within that state or elsewhere. No deduction was made for any taxes paid to the United States or to any other state. In computing the tax the value of tangible property located in New York and Massachusetts was admittedly included in the gross estate upon which the Pennsylvania tax was calculated upon the premise that such property had a tax situs in Pennsylvania. In that case there thus was a clear and express endeavor by the State of Pennsylvania to directly tax property which concededly was physically located in other states. The tax was applied to and calculated upon that property directly. Here the Wisconsin statutes do not attempt to impose taxes upon anything other than the property which is located in the State of Wisconsin. The statutes on the contrary restrict the taxes to property within the state. The values of property outside the State of Wisconsin are excluded from the value upon which the taxes are calculated. Furthermore, deduction is made for federal estate taxes in arriving at the value of the estate upon which such taxes are calculated, and in computing the Wisconsin estate tax full deduction is made for the taxes paid to other states. The dissimilarity between the two cases is readily apparent.

F. The Pattern of the Wisconsin Inheritance Tax Statutes Clearly is the Imposition of Taxes Only on the Property Within its Taxing Jurisdiction.

The Wisconsin statutes which impose the "normal" inheritance taxes are sections 72.01 to 72.24, the material parts of which are printed herein under the heading Statutes Involved. They were enacted in 1903. Very clearly their import is to confine the "normal" inheritance taxes to property within the State of Wisconsin or its taxing jurisdiction. While there are no express provisions therein that can be pointed to as so stating, the application and administration of such "normal" inheritance tax provisions has always over the years been consistently limited to property of a resident which is within the state or its taxing jurisdiction. It is clearly implied from the over-all language and effect of these provisions that they are so limited. No one has ever contended otherwise. Furthermore, it is fundamental that such would necessarily have to be the scope of such provisions. Otherwise they would be invalid to the extent they purported or endeavored to tax property not within the state or its taxing jurisdiction. If there were any doubt about it the provisions would have to be given that construction which would be constitutional.

Such "normal" inheritance tax provisions had existed for many years and been given application as above stated, when the Wisconsin "estate" tax law, sections 72.50 to 72.61, was enacted by Chapter 426, Laws of Wisconsin of 1931. The language of said sections when read as a whole clearly implies that the estate which is subjected to said "estate" tax is diminished by the property which is outside the state. Credit is given for and in the amount of any taxes paid

other states. The provisions of section 72.61 expressly say that the same law applies to this "estate" tax that is applied to the "normal" inheritance tax by the provisions in sections 72.01 to 72.24. That language of section 72.61 is:

"The provisions of Chapter 72, relating to the tax on inheritances and transfers, shall apply * * *."

The reference to "Chapter 72" is occasioned by the fact that when sections 72.50 to 72.61 were enacted in 1931 the provisions in Chapter 72 of the Wisconsin statutes consisted solely of the "normal" inheritance tax statutes, sections 72.01 to 72.24. At the present time Chapter 72 of the Wisconsin statutes is composed solely of sections 72.01 to 72.24 relating to the "normal" inheritance tax, sections 72.50 to 72.61 providing the "estate" tax, and section 72.74 imposing the 30% additional "emergency" tax.

This statement in section 72.61 clearly expresses the legislative intent that the "estate" tax imposed by sections 72.50 to 72.61 is to be applied the same as the "normal" inheritance tax provisions and thus is to apply only to the same transfers of property that are taxed by the "normal" tax.

The 30% "emergency" inheritance tax statute, section 72.74 was originally adopted in 1933 by Chapter 363, Sec. 3, Laws of Wisconsin of 1933, but solely for relief purposes. The "normal" inheritance tax and the Wisconsin "estate" tax were then both in operation. The state was sorely pressed for funds because of the depressed economic conditions and the legislature sought ways to obtain additional revenue and especially to carry the relief load. By said Ch. 363, Laws of 1933 it imposed (1) an emergency income tax on income of 1932, which was in addition to the then

existing income tax, (2) an emergency gift tax and (3) this "emergency" additional tax on inheritances, all for the express purpose of raising additional revenue for relief. It merely viewed the existing taxes and finding them insufficient imposed these new taxes as an additional burden. The legislature found that the taxes on existing sources of revenues were insufficient to produce the needed revenue and merely in effect increased the taxes. So far as the matter of inheritance taxes is concerned, the legislature clearly did nothing more in 1933 than say that the property within the state's taxing jurisdiction should stand a part of the burden of the additional revenue needs of the state. The language in section 72.74 that the additional "emergency" tax " * * * is hereby imposed on all transfers of property which are taxable under the provisions" of sections 72.01 to 72.24 and 72.50 to 72.61, is conclusive that such "emergency" tax is thus solely upon the same property that is subject to the "normal" and "estate" taxes.

By successive amendments biennially the Wisconsin legislature extended the life of the provisions in section 72.74. By Chapter 367, Sec. 3, Laws of 1943, in extending its effect to July 1, 1945, the purpose and use of the revenue thus raised was changed to its present language of providing revenue "for the rehabilitation of returning veterans of World War II, construction and improvements at state institutions and other state property, and postwar public works projects to relieve postwar unemployment."

From the above analysis of the Wisconsin inheritance tax statutes it is demonstrated that clearly the over-all intent and application thereof is the imposition of taxes solely upon the property which is within the state's taxing jurisdiction.

II. THE 30% ADDITIONAL EMERGENCY TAX IMPOSED BY SECTION 72.74 WISCONSIN STATUTES 1943 IS NOT DIRECTLY GEARED TO THE FEDERAL ESTATE TAX.

This is self-evident. On the contrary it is computed at 30% of the amount of two other independent taxes. By its express terms this "emergency" tax is an amount "equal to 30 per cent" of the amount of the "normal" Wisconsin inheritance tax imposed by sections 72.01 to 72.24 and the Wisconsin "estate" tax imposed by sections 72.50 to 72.61.

Both the "normal" inheritance tax and the Wisconsin "estate" tax are computed and imposed independently of this "emergency" tax. No question is raised as to the validity of those taxes and they must therefore stand as admittedly valid. They are computable and payable regardless of the existence of this "emergency" tax. Such taxes are payable in the same amount even though this 30% "emergency" tax did not exist. These two other taxes were in effect and operation before the 30% additional "emergency" tax was adopted, and the 30% additional tax is an "emergency" tax whose repeal would in no way affect the amount of said other taxes.

It is not until and after the amounts of said other taxes are computed and fixed that this "emergency" tax is laid and it is computed at the amount which is "equal to" 30% of the amount of such other taxes. In other words, such other independent taxes are taken at their calculated amounts and the "emergency" tax is figured thereon without any reference to how such amounts were calculated. They are taken as a fixed amount of taxes in dollars and cents and then the 30% figure is applied to such dollars and cents amounts to obtain the amount of the "emer-

gency" tax. That this result may bear some relationship, mathematical or otherwise, to the amount of the federal estate tax credit or even to the amount of the federal state tax is purely coincidental.

The statement of appellant that the 30% additional "emergency" inheritance tax imposed by section 72.74 is always 30% of the federal estate tax credit and 24% of the federal basic estate tax is both incorrect and misleading. The tables submitted in connection with such statement do not state the true picture. Such tables are correct and the calculations therein are applicable *only* where the entire property of the decedent is in the State of Wisconsin and the "normal" Wisconsin inheritance taxes under sections 72.01 to 72.24 are less than the 80% federal estate tax credit. Where that is true then obviously no question of extraterritorial taxation can possibly arise. Accordingly the examples in said tables prove nothing that is relevant to this case.

Furthermore, the appellant makes another erroneous statement where, in summarizing the Wisconsin inheritance tax laws, it is stated that the Wisconsin "estate" tax of sections 72.50 to 72.61 is "levied upon the whole estate of the decedent." There is no such language in those sections and such tax, being grounded upon jurisdiction to tax because of domicile of the decedent, is limited to and levied only upon the Wisconsin estate of the decedent.

This Wisconsin "estate" tax accrues in less than 1% of Wisconsin estates. It is the exceptional case in which it is applicable at all. This arises because it applies only in estates in excess of approximately \$2,000,000 or where there are very peculiar circumstances, since the "normal" Wisconsin inheritance tax computed under sections 72.01

to 72.24 exceeds the amount of the federal estate tax credit of 80% of the federal basic tax.

It is thus abundantly clear that the 30% additional "emergency" tax of section 72.74 is not geared to the federal estate tax but to the amount of the "normal" Wisconsin inheritance tax of sections 72.01 to 72.24 and the amount of the Wisconsin "estate" tax of sections 72.50 to 72.61, both of which taxes are imposed solely upon the Wisconsin estate of the decedent and are not laid upon any property other than that which is within the jurisdiction of the State of Wisconsin.

It is therefore submitted that the decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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